No. 84-1484

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Whether the Wisconsin labor law violator contract debarment statutes are preempted by the National Labor Relations Act by virtue of the Supremacy Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

Gould Inc.'s subsidiaries (other than wholly owned subsidiaries) and affiliates are:

Acumuladores del Centro, S.A.
Acumuladores Mexicanos, S.A.
AMI Liegenschaftsverwaltungs-Gesellschaft m.b.H.
Asahi Microsystems, Inc.
Austria Mikrosysteme International Gesellschaft m.b.H.
AMI Micro-systems, GmbH
AMI Micro-systems Limited
AMI Microsystems S.A.R.L.
AMI Microsystems - S.r.L.
Andover Controls Corporation
Bimetal Bearings Limited
Clevite de Mexico, S.A. de C.V.
Eloquent Systems Corporation
Toltec Group Limited
Toltec Computer Limited
Toltec DataRing Limited (i)
Toltec IMSCAN Limited (i)
Compagnie Francaise d'Electro-Chimie
Outarex S.A.R.L.
SIDAC S.A.R.L.
S.I.D.M.A.P.
Societe Nouvelle A.M.B. S.A.R.L.
Guernsey Insurance Management Services Limited
Gould H.B. Medical Products Ltd.
Gould-H.B. Medical Products (Hong Kong) Limited
Gould H.B. Medical Products (Singapore) Pte. Ltd.
Nikko Gould Foil Company, Limited
I-T-E Latinoamericano, S.A. de C.V. (i)
Penske Corporation

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 c1.3 of the United States Constitution provides in pertinent part:

> "The Congress shall have Power to regulate commerce . . . among the several states . . ."

Article VI cl.2 of the United States Constitution provides pertinent part:

> "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary not withstanding."

Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(a), provides in pertinent part:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.

Section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(c) provides in pertinent part:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter.

Section 10(f) of the National Labor Relations Act as amended, 29 U.S.C. 160(f):

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in

the United States Court of Appeals for the District of Columbia.

Wis. Stat. § 16.75 provides:

> The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under S.101.245.

Wis. Stat. § 101.245 provides in pertinent part:

> (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period . . ., if the 3 final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act. . . .
>
> (4) A name shall remain on the list for 3 years.

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WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

PROCEEDINGS BELOW

On August 25, 1982, appellants, the Wisconsin Department of Industry, Labor and Human Relations, *et al.* ("Wisconsin" or the "State"), debarred appellee, Gould Inc. ("Gould" or the "Company"), from doing business with Wisconsin until July 1, 1985, pursuant to Wis. Stats. §§ 16.75(8) and 101.245 (1981) ("statutes" or 'blacklist laws").

Gould sued appellants alleging that the statutes are preempted by the National Labor Relations Act as amended (29 U.S.C. § 151 *et seq.*) ("NLRA" or the "Act") and violate its rights to due process and equal protection (R.1).*

Gould moved for preliminary relief (R.2). The district court ruled that the statutes restrict employers' rights to appeal adverse National Labor Relations Board ("NLRB" or "Board") rulings and penalize conduct governed by the NLRA (Jt. App. pp. 82-83). It preliminarily enjoined Wisconsin from enforcing same (Jt. App. pp. 5-6).

The parties then stipulated that the material facts, as expressed by the district court, were undisputed (R. 16). Both parties requested summary judgment (R. 17; R. 19).

Based thereon, the district court, concluded that:

1. the statutes have the purpose and effect of regulating conduct governed by the NLRA (J.S. App. pp. 73-74, 80);
2. the statutes interfere with the development of federal labor policy by dissuading employers from engaging in "gray areas" of arguably protected or arguably prohibited activity, thereby depriving the NLRB and the courts of the opportunity to rule on the legality of such conduct (J.S. App. pp. 78-79);
3. the statutes infringe upon the jurisdiction of the federal courts of appeals by deterring employers from seeking judicial review of Board decisions (J.S. App. pp. 76-77);
4. the statutes penalize employers beyond the remedies prescribed by the Board and the Act (J.S. App. p. 79); and
5. the statutes serve no legitimate, deeply rooted non-labor interest of local concern (J.S. App. p. 72).

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* Record entries are cited as "R. ____"; the Joint Appendix is cited as "Jt. App. ____"; and the Jurisdictional Statement Appendix is cited as "J. S. App. ____".

Accordingly, the district court held that the statutes were preempted by the NLRA and unconstitutional under the Supremacy Clause (U.S. Const. art. VI, cl. 2) and enjoined Wisconsin from enforcing its statutes as to Gould[1].

On appeal to the United States Court of Appeals for the Seventh Circuit, Wisconsin did not claim that the district's court's findings were clearly erroneous. Rather, appellants contended that the statutes were not preempted as a matter of law because, *inter alia:* (1) the state, acting as a "market participant", can restrict its purchases so as not to promote labor law violators in keeping with its deeply rooted policy of discouraging employer labor law violations; (2) if the state action does not prohibit or punish activity protected by the NLRA, there is no preemption and, therefore, no penalty (Brief of Defendants-Appellants in Court of Appeals pp. 3, 12, 15).

The Seventh Circuit agreed with the district court that the purpose and effect of the statutes are to regulate conduct governed by the NLRA (J.S. App. pp. 27, 31) and that they imposed a penalty for violations of the NLRA (J.S. App. pp. 15 n.4, 32). Accordingly, it affirmed the judgment of unconstitutionality.

STATEMENT OF FACTS

Gould consists of separate and autonomous divisions. Each is engaged in the manufacture and sale of distinct and often unrelated products. Each maintains its own facilities and equipment. Each establishes and maintains its own personnel policies and procedures. Each division is responsible for its own labor-management relations (J.S. App. pp. 47-48).

Between 1973 and 1980 the Board and courts of appeals found that three of Gould's there 20 divisions had violated the

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[1] Because the district court disposed of the matter on preemption grounds, it did not reach Gould's equal protection and due process claims (J.S. App. p. 82, n.11).

Act on four occasions. There is no claim that any contempt proceedings were initiated against Gould, from which it may be concluded that after Board orders were enforced, in whole or in part, by courts of appeals, the divisions involved complied. The cases involved a variety of alleged unfair labor practice violations, including a violation necessary to invoke judicial review of an election certification by the Board[2] and a violation involving Gould's discipline of certain union stewards for engaging in a strike during the term of a labor agreement containing a no-strike clause.

As far as can be determined by a review of the reported decisions, in none of the cases did the General Counsel claim that the violations were part of some corporate plan to deny employees their § 7 rights. The General Counsel did not allege that the division involved or Gould was a "recidivist" violator of the Act, nor did the General Counsel seek to impose extraordinary "recidivist" remedies. *See infra,* p. 18 n. 6. Moreover, the Board's remedies were limited to the particular plant or division involved.

In *Gould Inc., Electric Heat Division,* 216 NLRB 1031 (1975), the division's Cookesville, Tennessee plant was accused of violating the Act during a union organizing campaign. The plant was charged with a series of unfair labor practices including discharging employees on account of their union activities, interrogating employees and promising to increase benefits. The Board sustained all the charges and ordered the plant to make the employees whole and post an appropriate notice.

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[2] The Act does not provide for direct appeal of Board decisions in "representation" proceedings under Section 9. If an employer believes that a Board decision as to bargaining unit composition or conduct of election was wrong, the only way it can obtain review is to refuse to bargain with the certified union. *Magnesium Casting Co. v. NLRB,* 401 U.S. 137, 139 (1971). A complaint under § 8(a)(5) issues, summary judgment generally is entered by the Board, and the employer appeals on the ground that the Board's certification was wrong in the first instance.

On appeal, the Sixth Circuit found that the division had not unlawfully promised to increase benefits and refused to enforce that portion of the Board's order. It sustained the remainder of the decision on the ground that it was supported by substantial evidence. *NLRB v. Gould Inc.*, 542 F.2d 1176, 80 CCH LC ¶ 11,953 (6th Cir. 1976), *cert. denied*, 430 U.S. 907 (1977).

Gould Inc., Electric Heat Division, 221 NLRB 899 (1975), arose out of the same organizing campaign at the same plant. The plant was charged with other violations including interrogation, promising benefits, threats and discharging an employee on account of union activity. The plant contended that it had not acted unlawfully and that General Counsel, under the Board's decision in *Jefferson Chemical Company, Inc.*, 200 NLRB 992 (1972),[3] should have brought the charges in the prior proceeding. The plant sought to review employee affidavits obtained by the General Counsel in order to show that he knew or should have known of the basis for the new charges as of the time of the prior proceeding.

The Board found that, while the plant had committed many of the violations as alleged, General Counsel had failed to prove that plant management's decision to discharge the employee was unlawful. It also held that the General Counsel had no reason to know of the asserted violations during the earlier proceeding and, therefore, refused to permit the plant to review the affidavits.

On appeal, the major issue was whether the plant was entitled to inspect the affidavits in order to establish its *Jefferson Chemical* defense. The Court of Appeals found the Board's position a reasonable interpretation of the Act and enforced the order. *NLRB v. Gould Inc.*, 550 F.2d 1060 (6th Cir. 1977).

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[3] Under *Jefferson Chemical*, General Counsel is foreclosed from issuing a new complaint predicated on events which were or should have been known to General Counsel through his investigation of the charge in the earlier proceeding. *Gould Inc., Electric Heat Division*, 221 NLRB at 899.

In *Gould Inc., Electrical Components Division,* 237 NLRB 66 (1978), the division refused to bargain with the union at its Tampa, Florida facility in order to challenge a Board election certification. The division asserted, in defense of its refusal to bargain, that the union had engaged in election misconduct by waiving dues arrearages of employees thereby interfering with the employees' exercise of free choice during the decertification election. The Board disagreed.

The division petitioned for review of the Board's decision in *Gould Inc., Electrical Components Division v. NLRB,* 610 F.2d 316 (5th Cir. 1980), to determine whether a union could lawfully waive dues arrearages during a decertification campaign. The Fifth Circuit enforced the Board's Order on the ground that the union had a practice of waiving certain dues arrearages and, therefore, that the division had failed to establish specific evidence of a *prima facie* violation.

Finally, in *Gould Inc., Switchgear Division,* 238 NLRB 618 (1978), the division was cited for discharging two union stewards who, it contended, led employees in a strike. The division took the position that the strike violated the labor contract's no-strike clause. The Board found that the strikes were protected activity not covered by the no-strike clause, and that the division had unlawfully singled out the union stewards for discharge.

The Switchgear Division disputed the decision and the Board sought judicial enforcement. In *NLRB v. Gould Inc., Switchgear Division,* 638 F.2d 159 (10th Cir. 1980), *cert. denied sub nom. Brown Boveri Electric, Inc. v. NLRB,* 452 U.S. 930 (1981), the Tenth Circuit affirmed the Board's decision on the ground that the union had not clearly and unmistakably waived its right to engage in sympathy strikes.

None of the foregoing violations occurred in Wisconsin. None involved divisions doing business with Wisconsin. The violations occurred, and most had been remedied, before Wisconsin enacted its blacklist laws. Each of the cases had

concluded, and the violations had been presumably remedied to Board satisfaction, long before August 25, 1982 the date of Gould's debarment. In fact, by August, 1982, Gould owned none of the divisions involved in the charges (J.S. App. pp. 51-52).

As of August 25, 1982, the Medical Products Division and the Instrument Division had contracts to provide goods and services to the University of Wisconsin, including vital medical equipment for which the particular division may have been the sole source (R. 2; Exh. 2). Although neither of these divisions had committed unfair labor practices, as part of Gould they were debarred.

Wisconsin refused to permit the Medical Products and Instrument divisions to bid on future contracts and threatened to cancel existing contracts as soon as possible. Wisconsin also notified other vendors that they could not sell to the state products containing components manufactured by a Gould division (R.5, Exh. 3).

SUMMARY OF ARGUMENT

Wisconsin seeks to have the Court establish a "market participant" exception to the Supremacy Clause of the United States Constitution which has never heretofore been recognized. In a preemption case, it urges application of the market participant exception recognized by the Court only in considering the constitutionality of certain limited exercises of state spending power where Congress has not acted under the Commerce Clause. Here Congress has legislated extensively to create a complex and fully integrated statutory scheme in furtherance of a national labor relations policy.

The market participant exception has served as a constitutional *shield* protective of state actions in which a state favors its local residents over others in its sales, purchases, and similar business transactions. The doctrine's fundamental

premise is that favoritism in such transactions toward those who fund the state's treasury does not offend the Constitution. Such parochialism is mere participation in, rather than regulation of, the market.

But were it applied outside the dormant Commerce Clause arena, however, the market participant exception would be loosed from its conceptual moorings of tolerable local favoritism and become a different doctrine altogether.

Wisconsin would establish it as a constitutional *sword* with which it may cut a path toward *any* goal consistent with its constituents' "social and moral policy choices" (App. Brief p. 30), including those at odds with federal law and policy.

State debarment to punish violation of federal law ceases to be mere participation in the market. It is an effort to regulate conduct—indeed, employer conduct having nothing whatsoever to do with the state's transaction or the market in which it occurs—by a potent means of governance.

Wisconsin, and its amici, virtually ignore *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), and the sensitive balancing test of federal interest in uniform national labor policy versus legitimate non-labor state interests which has emerged from this precedent. They seek exception to it or suggest that the Court must go beyond it. And even in this they cannot agree.

Garmon and the subsequent preemption decisions of the Court are more than adequate to give proper consideration to the state legislation at issue. Wisconsin's labor law violator debarment laws profoundly interfere with the federal statutory scheme in two major respects:

First, Wisconsin imposes a harsh debarment *penalty* for violation of a federal law which Congress intended to be remedial only and from which Congress has excluded federal debarment as a potential consequence of violation.

Second, these laws chill employers in the exercise of their statutory right of appeal to the federal judiciary by imposing its penalties, not upon those who commit unfair labor practices, but only upon those who appeal adverse Board decisions in this regard and lose, even partially.

On the other side of the preemption scale, a legitimate, *non-labor,* local interest *in the employer conduct it seeks to influence and govern,* is non-existent. Wisconsin suggests no local impact, consequence or aspect of the conduct which it has some traditional responsibility to address. Its admitted objective and interest is only to encourage compliance with federal labor laws. There simply is nothing of deeply-rooted local concern to counterbalance the federal interest in a uniform national labor-management policy.

Under such circumstances, the Supremacy Clause dictates that state intrusions must be restrained "regardless of the mode adopted." *Garmon,* 359 U.S. at 244

ARGUMENT

I. WISCONSIN'S STATUTES VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

Under the Supremacy Clause, the Constitution of the United States and the laws enacted pursuant thereto are the supreme law of the land notwithstanding the constitutions or laws of the various states. Since *McCulloch v. Maryland,* 4 Wheat. 316, 436 (1819) (Marshall, C. J.), the Court has held:

> [T]he states have no power, by taxation or otherwise, *to retard, impede, burden, or in any manner control,* the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. (emphasis added.)

State law must be preempted wherever it interferes with or is contrary to federal law, *Gibbons v. Ogden,* 9 Wheat. 1, 211 (1824), or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Thus, "the purpose of Congress is the ultimate touchstone of preemption." *Metropolitan Life Insurance Co. v. Massachusetts,* ____ U.S. ____, 85 L. Ed. 2d 728, 745 (1985).

In enacting the NLRA, Congress declared it to be the policy of the United States to protect the rights of self-organization and collective bargaining between employers and employees, as its chosen means of fostering labor-management peace. *See, Metropolitan Life Insurance Co.,* 85 L. Ed. 2d at 749. By establishing an integrated system for the resolution of "industrial strife," it sought to preserve the free flow of goods in interstate commerce. 29 U.S.C. § 151.

Congress recognized a national problem to be dealt with on a national basis. Congress enacted a uniform and comprehensive national labor policy, in part, because it believed that state legislatures, given the diversity of local attitudes

toward labor controversies, could not be expected to establish a consistent and cohesive labor policy. *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 286-87 (1971); *Garner v. Teamsters,* 346 U.S. 485, 490 (1953); *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144 (1971).

The Act prescribes the rights of employees and employers in their relations affecting commerce. Congress protected certain conduct, prohibited certain conduct, and left other conduct to the free play of the parties' economic forces. *Nash-Finch Co.,* 404 U.S. at 144. Thus, Congress occupied the field of labor management relations that the NLRA covers. *Bus Employees v. Wisconsin Board,* 340 U.S. 383, 397-398 (1951); *Guss v. Utah Labor Board,* 353 U.S. 1, 9-10 (1957).

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), is the fountainhead of the labor law preemption doctrine. Justice Frankfurter's articulation of that doctrine is now familiar.

> When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act [citations omitted]. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.
>
> When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the

> federal enactment requires that state jurisdiction must yield.

Id. at 243-44.

Subsequent considerations of *Garmon* by the Court have resulted in the identification of two branches of *Garmon* preemption.[4]

Under the first branch, preemption is mandated where the conduct regulated by the state is actually protected or prohibited by the NLRA. Under this branch "the relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that federal law *must prevail.*" *Brown v. Hotel and Restaurant Employees Union Local 54,* ____ U.S. ____, 82 L. Ed. 2d 373, 384 (1984), *citing Free v. Bland,* 369 U.S. 663, 666 (1962). *See Operating Engineers v. Jones,* 460 U.S. 669, 680 (1983).

The second branch of *Garmon* is invoked when considering state enactments which touch upon matters which are only arguably subject to the NLRA. Under this branch, state laws are presumptively preempted; however, "due regard for federalism" permits the state law to stand where the conduct being regulated is merely of peripheral concern to the Act or is of unusually deeply-rooted local interest." *Brown v. Local 54,* 82 L. Ed. 2d at 384. *See also, Belknap, Inc. v. Hale,* 463 U.S. 491, 498-99 (1983). It is generally utilized in cases where there is a potential for conflict between state tribunals and the NLRB's primary jurisdiction to determine whether arguably protected or prohibited conduct is governed by the Act or when considering state laws of general application which, in the context of a

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[4] Additionally, the Court has delineated another area of preemption where the conduct which the state purports to regulate has been left by federal labor policy to the free play of economic forces. *Compare Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976) *with New York Telephone Co. v. New York St. Dept. of Labor,* 440 U.S. 519 (1979).

particular case, are brought to bear upon aspects of a labor dispute. *See, e.g., San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *Farmer v. Carpenters,* 430 U.S. 290 (1977); *Sears v. Carpenters,* 436 U.S. 180 (1978).

In the instant case, the Wisconsin statutes, by their very terms, address conduct actually subject to national regulation. The statutes are not laws of general application. They are labor relations-directed statutes which operate exclusively against employers who have been held to have engaged in labor relations practices governed by federal law. This is not a matter of indirect effect; it is a matter of deliberate design (J.S. App. p. 27 n. 9, 73-74). Wisconsin's avowed purpose is to "discourag[e] labor law violations" and "influence private conduct already prescribed ([sic]) by federal labor policy." (Brief In Support of Motion for Summary Judgment, R. 22 pp. 11-12, 18). In this case, therefore, "the relative importance to [Wisconsin] of its own law is not material . . ." *Brown v. Hotel and Restaurant Employees Union Local 54,* 82 L. Ed. 2d at 384. Wisconsin is simply ousted of all jurisdiction and may not pass any legislation which seeks to "control conduct which is the subject of national regulation", *Garmon,* 359 U.S. at 244, regardless of the degree of interference with federal policy that it entails and regardless of the extent or "depth" of the local concern involved. "[S]tate jurisdiction must yield". *Garmon,* 359 U.S. at 244.

It is unnecessary, however, to become enmeshed in arguments over which branch of *Garmon* preemption to invoke or whether the employer conduct Wisconsin seeks to "influence" is actually, or only arguably, protected or prohibited. It is unnecessary here to dwell upon the significance of whether the state enactment is a labor law or one of general application. At core, preemption analysis, at the very least, entails a consideration and balancing of the degree of potential interference with federal interest in uniform labor policy against the state's legitimate non-labor interest in the labor conduct it is regulating by application of its law.

Here, as the district court's and, to a lesser extent, the court of appeals' analyses set out, the interference with federal labor policy is both manifest and manifold and the state's legitimate non-labor interest simply non-existent. Indeed, the state and its *amici* tacitly acknowledge this by their varied efforts to avoid, alter, or gain an exception to, the preemption doctrine under the banner of market participation.

Before addressing Wisconsin's market participant theory, however, it is worthwhile to bring into focus the true extent of Wisconsin's intrusion upon federal domain and the absence of any legitimate Wisconsin interest in doing so.

A. Wisconsin's Statutes Interfere With The Federal Statutory Scheme.

1. The Wisconsin Statutes Impose A State-Mandated Penalty For Violation Of Federal Law Inconsistent With The Federal Statutory Scheme.

The keystone of federal labor policy is that federal law serve the goal of industrial peace and stability through collective bargaining. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *NLRB v. Pincus Bros., Inc.*, 620 F.2d 367 (3d Cir. 1980). In enacting the NLRA, Congress circumscribed the role of government intervention to that of maintaining an atmosphere in which free collective negotiations could occur and providing a means by which remedies could be secured when labor or management deviated from the federal model of appropriate labor-management relations. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981).

While Congress could have imposed criminal sanctions, fines or other penalties, it did not do so. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); Our national labor policy is remedial not punitive. *Consolidated Edison Co. v. Labor Board*,

305 U.S. 197 (1938); *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939). Congress chose not to brand parties who transgress the boundaries of fair labor practice as "outlaws." *NLRB v. American Mfg. Co.*, 351 F.2d 74, 80 (5th Cir. 1965). *See also, NLRB v. Townhouse TV*, 531 F.2d 826, 832 (7th Cir. 1976).

And rightly so. Disputes between management personnel and rank and file workers and their unions are not isolated, "one-shot" business transactions. They are part of the fabric of ongoing relationships in which, despite their conflicts and trespasses, the parties must continue to get along. *Cf. Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 580-82 (1960). The imposition of penal sanctions, which go beyond a straightforward resolution of the dispute or correction of the "unfair labor practice," is antithetical to the peaceful maintenance of the ongoing relationship. Indeed, the fortunes of both are so intertwined that to *punish* one side may, more likely than not, inure to the detriment of the other. *Cf. Consolidated Edison v. Labor Board*, 305 U.S. at 235-38; *Local 57, ILGWU v. NLRB*, 374 F.2d 295, 302-03 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967); *NLRB v. Ship Shape Maintenance Co., Inc.*, 474 F.2d 434, 443 (D.C. Cir. 1972).

Whether punitive sanctions would, in fact, impair industrial peace is beside the point. It is only important that Congress chose to pursue another course. For Wisconsin to debar an offending employer from government contracts does not in any way remedy the underlying labor practices or compensate for injury. It is a mindless flailing out to punish that which Wisconsin has decided is "recidivism." Had Congress chosen to enact punitive sanctions for violations of *its* federal law, it had the power to do so. By creating punitive sanctions, Wisconsin "clearly interfered with the federal scheme." (J.S. App. p. 15).

The conclusion that debarment is contrary to the federal scheme is clear not only from Congress' avoidance of punitive

measures in general, *Republic Steel Corp.*, 311 U.S. at 10, but also from the fact that Congress was asked to provide for federal contract debarment to be invoked by the General Counsel in cases of flagrant or chronic violation and declined to do so. The Labor Law Reform Bill of 1978 (H.R. 8410, S. 2467, 95th Cong. 2d Sess. 30 (1978)) contained a debarment provision. In debating its wisdom, objections to the penal nature of debarment were raised by members of Congress.

> [D]ebarment would be profoundly counterproductive to the goal of S.2467 [Labor Law Reform Bill of 1978] to protect workers' rights because of the simple fact that *debarment would, in many cases, mean the loss of jobs for those employees working on the contract.*

Statement of Sen. Dole, 124 Cong. Rec. S.14,025 (1978) (emphasis added). *See also,* Statement of Sen. Hatch 124 Cong. Rec. S.13,843 (1978); Statement of Sen. Goldwater, 124 Cong. Rec. S.16,178 (1978) (debarment penalizes both employers and employees). The penal nature of Wisconsin's law is further underscored by comparison with the rejected federal legislation. At least that bill in its final form applied only to willful violations of an outstanding Board order. Moreover, it allowed for reinstatement upon accomplishment of the affirmative requirements of the Board's order.[5] *See* Labor Law Reform Act of 1978, S. Rep. No. 95-628, 95th Cong., 2d Sess. 55 (1978).

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[5] In sharp contrast, Wisconsin even penalizes employers for mere "technical" violations of the Act, in which the employer can obtain judicial review of a Board representation determination only by refusing to bargain with the union it has certified. *See, e.g., Gould Inc. Electrical Components Division,* 237 NLRB 66 (1978), *enf'd* 610 F.2d 316 (5th Cir. 1980). Moreover, under Wisconsin law, "any immediate change in behavior doesn't make any difference because it's a three-year duration and it doesn't matter what the Company does in the interim." (Jt. App. pp. 70-71).

Notwithstanding Wisconsin's protestations to the contrary, Congress' refusal to adopt a debarment penalty, does stand as an indictment of Wisconsin's initiative. *Cf. Bus Employees v. Wisconsin,* 340 U.S. at 394-395. In that case Wisconsin claimed, as here (App. Brief, pp. 37-38), that Congress' failure to enact certain provisions in the NLRA hardly abrogates the right of a state to enact such legislation. The Court squarely rejected that argument:

> This proposal, closely resembling the pattern of the Wisconsin Act, was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it.

340 U.S. at 394-95.

Moreover, it should be recognized that Wisconsin and other states (National Governors Association Brief, p.2, n.1) would effectively provide the NLRB's General Counsel with a potent punitive weapon *denied to that office by Congress.* The General Counsel *can* seek Board orders and court enforcement thereof *even where* the employer has chosen to comply. 29 CFR §§ 101.13(b), 101.14 (1983). State debarment actually could be triggered by action of the General Counsel. In the case of Wisconsin, for example, the General Counsel need only decide to pursue charges against an employer, even one who is prepared to comply, through to court enforcement order on three occasions and that employer will be debarred. In a real sense, therefore, Wisconsin has altered the powers of the General Counsel and the legal consequences that that *federal office* can precipitate for violation of the Act.

Finally, the extent to which Wisconsin interferes with the federal scheme is exposed further by a comparison of its treatment of what it has chosen to lable as "recidivism" with the federal definition of "recidivism" and the latter's response thereto.

The NLRB *does* have authority to remedy recidivist activities through enforcement and contempt proceedings (29 CFR § 101.13(b) (1983)) or through appropriate broad remedies in subsequent unfair labor practice cases under § 10(c) of the Act. The Board has done so where employee conduct met its definition of recidivism.

While federal labor policy has never adopted a mechanical definition of "recidivism," it does recognize the concept[6] and imposes additional *remedial* steps to be taken by recidivists. *See, e.g., Labor Board v. Express Pub. Co.*, 312 U.S. 426, 436-437 (1941); *J. P. Stevens & Co., Inc. v. NLRB*, 638 F.2d 676, 688 (4th Cir. 1980).

In *none* of the cases for which Gould was debarred, however, did the Board assert that Gould was a "recidivist" violator upon whom extraordinary remedies should be imposed. Gould's violations were isolated incidents occurring in large and diverse workforces which evidenced no general disregard for fundamental employee rights or a deliberate flaunting of the requirements of the Act. (*See* pp. 4-7, *supra.*)

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[6] The Board and courts, in imposing extraordinary remedies, have identified and defined a "recidivist" labor law violator under the federal scheme. In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979) the Board held that it will impose a broad cease and desist order:

> *only* when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. (emphasis added).

In *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 11-12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), the First Circuit upheld extraordinary Board remedies where the violations were *flagrant and repeated.* The Fourth Circuit in *J. P. Stevens & Co., Inc. v. NLRB*, 668 F.2d 767, 777 (4th Cir.), *vacated and remanded*, 458 U.S. 1118 (1982), upheld the imposition of extraordinary remedies "only in cases of flagrant, aggravated, persistent and pervasive employer misconduct."

2. The Wisconsin Statutes Interfere With The Exercise Of An Employer's Right Of Appeal And Development Of Federal Labor Policy Under The NLRA.

Despite Wisconsin's stated abhorrence of labor law violators, the impact of the Wisconsin statutes is not against labor law violators *per se,* but *only* against an employer who has tested the correctness of the Board's position in federal courts of appeals. An employer may violate the Act repeatedly, and so long as he acquiesces in the Board's remedies, the Wisconsin statutes do not touch him.

But let him test the Board's decisions in a federal court of appeals and lose, or partially lose, three times within five years and Wisconsin debars him from interstate commerce with it.

Direct interference with, or encumbrance of, the federal right of appeal, not mere labor law violation, is the core of Wisconsin's statutory scheme. Federal courts of appeals have ample power to discipline those who take frivolous appeals and do not need Wisconsin's assistance.

The district court recognized this aspect of the statutes and based its decision, in part, thereon. It held that "[e]mployers who want to appeal from Board decisions will be deterred by Wisconsin's categorical refusal to purchase goods from employers who have three National Labor Relations Board convictions that have been affirmed, in whole or in part, by a federal court of appeals." (J.S. App. 76-77).

The Seventh Circuit, having already found the statute to be preempted because of the penal aspects of debarment, did not accept this additional ground. Its rejection was primarily based upon the rationale that "[t]he possibility of harsher sanctions because of an appeal is not an unheard of event in our system of justice." (J.S. App. p. 33).

We agree with the court of appeals' observation but not the conclusion it drew therefrom. The court of appeals overlooked Gould's point that the statute is offensive not only because of transgressions against due process and equal protec-

tion,[7] but also because it is the *state* which is imposing this "harsher sanction" upon the exercise of a *federal* statutory right of appeal. In other words, the court of appeals missed the extent of the preemption doctrine. Whatever may be said about the constitutionality under the Fifth and Fourteenth Amendments of imposing such a risk burden upon access to federal review[8] it is not the place of the *state* to impose it.

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[7] Wisconsin's rote definition of "recidivism" violates the Equal Protection Clause of the Fourteenth Amendment. In order for a discriminatory classification to survive equal protection scrutiny, it must be rationally related to a legitimate state purpose. The sole purpose advanced by Wisconsin for its "recidivist" classification is to encourage employers to comply with the NLRA. As discussed *infra*, pp. 25-29, this is not a legitimate state interest.

Wisconsin debars entire corporations for the isolated acts of their divisions. This classification discriminates against large corporations which, for legitimate business reasons, delegate the conduct of labor relations to the individual plants or divisions. The proponents of proposed federal debarment recognized the irrationality of such a classification by limiting their debarment bill to "the products or service performed at the particular facility or facilities where the willful violation occurs or the business entity legally responsible for the willful violation." H.R. 8410, 95th Cong., 2d Sess. (1978).

Moreover, Wisconsin's definition is not based on the number or seriousness of unfair practices. It is based solely on the number of appeals lost or partially lost. Thus an employer can commit scores of unfair labor practices so long as judicial review of the Board order is not sought.

[8] In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court held that access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. *Accord, Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). State statutes, which dampen the exercise of First Amendment rights, however slight the inducement to the individual to forsake such rights, in the absence of compelling state interests, are unconstitutional. *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976). And where there is significant impairment of First Amendment rights, the statutes must survive exacting scrutiny.

(Footnote continued on following page)

In *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967) the Court declared Florida's unemployment compensation statute preempted by the NLRA because thereunder an employee who alleged unfair labor practices in connection with a discharge gave rise to a "labor dispute" during which time workers were ineligible for unemployment benefits. As did the district court here, the Court held that such a scheme had the effect of deterring employees from filing charges with the Board and thereby interfered with the NLRA's enforcement scheme. The Court found that employees were left with two choices: File a charge and risk financial injury until the Board's processes were complete or keep quiet and collect the benefits. The Court, therefore, held:

> Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. 389 U.S. at 239.

The similar chilling effect that debarment would have upon the exercise of *employer* rights of appeal under the Act was recognized by Congress during its consideration of proposed NLRA reform.

> The potentially chilling effect is more pronounced in Senate bill 2467 than in any of the other remedies in labor law history. With enactment of this bill, the employer who litigates a charge alleging that he was engaged in a "pattern" of unfair labor practices does not only face the loss of litigation expenses if his defense should prove

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(Footnote continued from preceding page)

Buckley v. Valeo, 424 U.S. 1, 64-65 (1976).

Here the district court concluded that the statutes deter employers from exercising their right to seek judicial review of Board decisions. Wisconsin has advanced no legitimate, let alone compelling, reason for this burden upon the right to appeal decisions. Therefore, the statutes violate First Amendment rights of access to the courts as guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

> frivolous, rather, the vague standards and definitions of the bill confront the employer with the possible loss of the Government contract portion of his business for at least 3 years, plus the time necessary to regain his lost contracts. *This severe penalty would tend to encourage an employer with a debatable defense to settle an unfair labor practice charge because of the uncertainty and seriousness of the penalty. So in the name of labor reform we silence employers who wish to speak their mind in a court of law.*

Statement of Sen. McClure, 124 Cong. Rec. S.16,170 (1978) (emphasis added). *See also,* Statement of Sen. Bartlett, *id.* at S.15,513 "[debarment] is . . . the final deterrent against employers pursuing their rights to contest union claims before the Board and the courts. . . ." *Accord,* Statement of Sen. Hatch, *id.* at S.16,166. *See also In re Sewell,* 690 F.2d 403 (4th Cir. 1982) (State court action by union for tortious contract interference by company president for seeking federal court review of NLRB election certification held preempted due to interference with federal appellate jurisdiction).

Courts of appeals, like the Board, are part of Congress' scheme to enforce the NLRA and determine national labor policy. *See, e.g., Labor Board v. Brown,* 380 U.S. 278, 291-92 (1965). Employers, such as Gould, are faced with the same "Hobson's choice" as the plaintiff in *Nash.* They may acquiesce in Board decisions and continue to do business with the state, or they may seek judicial review and risk the loss of substantial state business.

The Seventh Circuit also reasoned that appellate jurisdiction is not infringed because the Board itself may seek enforcement of its orders and because, if the employer's position has merit, it will likely prevail on appeal (J.S. App. pp. 35-36).

The first observation is irrelevant. As recognized by both the district court and the Seventh Circuit (J.S. App. p. 20 n.7), except in unusual circumstances, not claimed to be present here,

the Board does not seek enforcement of its orders unless the employer refuses to obey.[9] Moreover, the fact that the Board is entitled to seek judicial enforcement does not lessen the inhibition of the exercise of the correlative right by the employer of review and denial of enforcement.

The simple fact is that Congress granted a right of appeal to Board respondents and Wisconsin's law chills its assertion. It doesn't matter how much; Wisconsin simply has no right to do so. *Cf. Nash,* 389 U.S. at 240. The potential for such a deleterious consequence lies at the core of the policy considerations which underpins the preemption doctrine. *Garmon,* 359 U.S. at 246. Here, Wisconsin "burden[s] . . . the operation of [a] constitutional [law] enacted by congress to carry into execution the powers vested in the general government." *McCulloch,* 4 Wheat. at 436.

The contention that those with meritorious grounds for appeal will not be forestalled from pursuing their defenses on appeal, ignores the reality that the proper disposition of a legal dispute is often not that obvious or clear-cut. Reasonable men may differ. If it were not so, our judiciary would have only easy cases, which quite obviously is not the case.[10]

This is particularly so in the field of federal labor law and policy. Congress intended that the Board, like an arbitrator under a labor contract, bring its expertise in labor-management relations to the myriad of situations that it could not have wholly anticipated when it drafted the Act. *Cf. Steelworkers v. Warrior & Gulf Co.,* 363 U.S. at 578. It "fleshes out"

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[9] It is also often true that where the Board does seek enforcement it is because the employer has exercised what amounts to an indirect appeal by refusing to acquiesce in the Board's determination unless and until it has been affirmed by the judiciary. *See* 29 CFR § 101.14 (1983).

[10] *Compare NLRB v. Gould Inc., Switchgear Division,* 638 F.2d 159 (10th Cir. 1980) *with Gould Inc. v. NLRB,* 612 F.2d 728 (3d Cir. 1979).

substantive labor policy on a case-by-case basis. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). This evolutionary process of applying the Act's provisions in light of changing industrial practices, the complexities of industrial life and the Board's cumulative experience in dealing with labor-management relations, is "particularly fitting." *NLRB v. Weingarten, Inc.*, 420 U.S. at 265.

Consequently, the lines of demarcation between what is a fair or unfair labor practice are not always clear. Delineating between those personnel decisions, bargaining tactics or dispute resolution strategems which, in a particular case, are appropriately left to the free play of economic forces versus those which go too far, is very much a matter of judgment and policy and subject to shifts as experience puts its imprint upon the delicate economic balance of labor-management rights. There are, as the district court observed, many " 'gray areas'." (J.S. App. pp. 78-79). It is the primary function of the Board to establish and reshape those parameters if federal labor policy is to remain responsive to current realities. *NLRB v. Weingarten*, 420 U.S. at 265, 267.[11] It is this dynamic process also upon which such punitive enactments would intrude.

Unimpeded access to judicial review is essential in such an administrative framework. The judicial restraint and precedential stability which the courts bring to the process of molding national policy assure a measure of continuity which stands as a bulwark against any unjustified shifts in policy.

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[11] For example, the Board now holds that employers may discharge union stewards for violations of no-strike clauses under circumstances like those of *Gould Inc., Switchgear Division*, 238 NLRB 618 (1978). *See, Indiana & Michigan Electric Co.*, 273 NLRB No. 193 (1985) and *Indianapolis Power & Light Co.*, 273 NLRB No. 211 (1985).

Seafarers, Local 777 v. NLRB, 101 LRRM 2628 (D.C. Cir. 1979).

B. Wisconsin's Statutes Do Not Serve Any Legitimate Non-Labor Interest Deeply Rooted In Local Concern And Responsibility

Against the federal interest in uniform labor policy, and the degree of potential interference therewith, may be balanced the legitimate *non-labor* interests of the state which its enactment purports to serve. *Farmer v. Carpenters,* 430 U.S. 290 (1977). This entails a weighing of the local non-labor interest in the conduct the state seeks to regulate. State regulation of arguably protected or prohibited conduct will be tolerated where the conduct being regulated is merely of peripheral concern to the Act or is of unusually deeply-rooted local concern. *Brown v. Local 54,* 82 L. Ed. 2d at 383; *Belknap, Inc. v. Hale,* 463 U.S. at 498; *Garmon,* 359 U.S. at 243-244.[12]

In the instant case, however, there is *no* legitimate non-labor relations-related interest *to be weighed.* As both the district court and the court of appeals observed, and as Wisconsin has conceded throughout, its only professed interest

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[12] The types of state interest which have survived this balancing test include the protection of property rights and public safety under trespass laws where the employer has no NLRA recourse, *Sears v. Carpenters,* 436 U.S. at 207 n.44; the protection of the individual's reputation, *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966); the protection of the state's public safety interests against violence and threats of violence, *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131 (1957); and protection of the individual from intentional infliction of emotional distress not caused solely by conduct governed by the NLRA. *Farmer v. Carpenters,* 430 U.S. 290 (1977).

Not saved from preemption, however, are state laws which regulate labor conduct *as labor* conduct in order to achieve some other state purpose. *Bus Employees v. Wisconsin,* 340 U.S. 383 (law prohibiting public utility employees strikes, directed at preservation of public utility service *not* at maintenance of sound labor relations held unconstitutional). *Accord, Bus Employees v. Missouri,* 374 U.S. 74 (1963).

was and is to encourage compliance with federal labor law and to influence private conduct to that end (R. 22 pp. 11-12, 18; R. 21 p. 2; *see also* J.S. App. pp. 27 n.9, 73-74).

In the face of this major shortcoming in its argument against preemption, Wisconsin now tries to divert attention from it.

First, the Attorney General, suggests that the Wisconsin statutes are reflective of its citizens' "deeply-rooted" revulsion at labor law "miscreants." (App. Brief, p. 31). This, of course, is no more a *non-labor* interest than the state's desire to discourage federal law violation in general. Indeed, to accept this bit of sophistry would be to eviscerate the preemption doctrine. Presumably every piece of local legislation can be said to be the result of some local interest in its enactment.

Moreover, such a claim of "interest" ignores the fact that Congress determined that the "fostering" of labor conduct consistent with the NLRA is a *national* and not a local interest. 29 U.S.C. §§ 141(b), 151. Congress enacted the NLRA and entrusted its enforcement to the Board, in part, because it feared that the states were unable to:

> provide an informed and coherent basis for stablilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.

Motor Coach Employees v. Lockridge, 403 U.S. at 286.

Wisconsin's "revulsion" at Gould as a "miscreant," and its Pavlovian response thereto, is the very form of "local attitude" toward labor controversies which Congress sought to override in enacting a uniform federal labor law. *See, e.g., Garner v. Teamsters,* 346 U.S. at 490.

Second, Wisconsin and certain of its *amici* suggest that the state has a deeply-rooted local interest in its purchasing decisions. This tack, however, confuses the means of regulation with the end objective of that regulation. As the *Garmon* Court

noted, "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation." 359 U.S. at 243. *Garmon* and its progeny will consider the state's interest "where the *regulated conduct* touched interests so deeply rooted in local policy and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 244 (emphasis added).

The Wisconsin-regulated conduct here is not the state's purchasing activities; it is the employer's labor relations conduct which Wisconsin seeks to "influence" and "encourage." If the proper focus of inquiry was the state's interest in its mode of regulation, then that local interest would always exist by definition. States always have a deeply-rooted interest in the administration of their unemployment compensation statutes and the payment of benefits thereunder, *cf. Nash v. Florida,* 389 U.S. 235; in their injunction statutes, *cf. Garner* 346 U.S. 485; in their tort laws, *cf. Allis-Chalmers Corp. v. Lueck,* 85 L. Ed. 2d 206 (1985) and in any other laws enacted pursuant to their police power. In *Garmon,* for example, it would have been of no value to observe that the state has an interest in its civil damage laws.

Such tautologies are unavailing. Wisconsin's law is, by its very terms, concerned with labor conduct which is the subject of federal regulation. By its very structure, the activities to be addressed by Wisconsin and federal law, "private [employer] conduct", are coterminous. *Wisconsin seeks to "influence" the very same conduct but by a very different device.*

The proper question is whether the protected or prohibited employer conduct has impact or consequence *within* the state in which the state has a legitimate *non-labor* interest. The legitimacy requirement is not mere verbiage; rather, it requires, at least, that the conduct must have some intrastate consequence upon non-labor matters which it is the state's ac-

knowledged function and responsibility to regulate on behalf of its citizens. *Cf. Sears v. Carpenters,* 436 U.S. at 207; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131.

Unless this can be established, there is no countervailing area of local interest to balance against federal interests. At least in *Garmon,* for example, the union's injurious picketing activity occurred in California. Likewise, in the principal preemption cases relied upon by Wisconsin below, local conduct, was at issue. *See, e.g., Massachusetts Nursing Ass'n. v. Dukakis,* 726 F.2d 41 (1st. Cir., 1984) (Statutes aimed at control of local hospital costs), *Amalgamated Transit Union, Div. 819 v. Byrne,* 568 F.2d 1025 (3d Cir. 1977) (*en banc*), (Statutes aimed at controlling local transportation costs) and *Golden State Transit Corp. v. City of Los Angeles,* 754 F.2d 830 (9th Cir.), *cert. granted,* ____ U.S. ____, 85 L. Ed. 2d 159 (1985) (regulation of local cab companies) In those regulatory areas in which state enactments have weathered preemption challenges, the conduct had obvious local consequences of a non-labor relations nature. *See, e.g., Sears v. Carpenters,* 436 U.S. 180; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131.

Here, there is nothing. No alleged Gould unfair labor practice occurred in Wisconsin. None of the Gould divisions involved, nor Gould itself, is based in Wisconsin; in fact, the divisions involved in the unfair labor practice charges did not even do business with Wisconsin. No Wisconsin citizen has been shown to have been injured by Gould's conduct in *any* way, let alone in his person or property for which the state would normally be expected to provide a remedy. None involved local instrumentalities or utilities in which Wisconsin might have a quasi-governmental interest. *Cf. Bus Employees v. Missouri,* 374 U.S. 74 (1963).

Gould does not mean to suggest that mere identification of some local consequence will suffice to survive a preemption challenge, but it is, at least, the minimum "ante" to get into the game.

II. WISCONSIN'S RELIANCE UPON THE MARKET PARTICIPANT EXCEPTION TO DORMANT COMMERCE CLAUSE RESTRICTIONS OF STATE ACTION IS MISPLACED.

While Wisconsin makes some effort to save its blacklisting law under traditional preemption analysis, its principal effort is an attempt to have this Court declare a "market participant" exception to the preemption doctrine.

The market participant exception, however, is a creature of the dormant Commerce Clause's restriction upon protectionist trade legislation of the states which burden interstate commerce. While its "precise contours . . . have yet to be established," *South-Central Timber Development, Inc. v. Alaska,* ____ U.S. ____ 81 L. Ed. 2d 71, 80 (1984), it is clear that the Court has considered it and its ramifications only within the boundaries of that limited protectionist arena. *Id.*

However, Wisconsin's proposed extension of this narrow exception from the dormant Commerce Clause to the Supremacy Clause ignores fundamental differences in the implications and dictates of federalism where the area of conflicting policy under scrutiny is one in which Congress has chosen to adopt an extensive and complex regulatory scheme, as opposed to areas which it has declined to enter. Moreover, as the instant case demonstrates, loosed from its precise constitutional and conceptual moorings, the market participant exception represents a dangerous device for interference with federal law and policy.

Although the Commerce Clause is an affirmative grant of power to Congress to regulate interstate commerce, it has long been recognized as a self-executing limitation on the power of the states to enact laws burdening such commerce. *South-Central,* 81 L. Ed. 2d at 76 and cases cited therein. Under its aegis, the Court has struck down a wide variety of state laws which erect trade barriers for the protection of local business enterprises at the expense of interstate commerce. *See, e.g.,*

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

The market participant exception suffers such parochialism at the expense of interstate trade where the state is acting solely as a buyer or seller of goods and services. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *United Bldg. Trades Council v. Camden*, ____ U.S. ____, 79 L. Ed. 2d 249 (1984).

The exception's fundamental premise is that the Constitution and the policies of the Commerce Clause accommodate the desire of a state *to favor its local residents* in its own business dealings in the absence of congressional action.

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and *exercising the right to favor its own citizens over others.*

Alexandria Scrap, 426 U.S. at 810 (emphasis added).

It is critical to realize that the limited objective and impact of such legislation, which this Court has declared constitutionally tolerable, circumscribes and defines the legitimate state interest which may be served by such market participatory discrimination. A state is thus permitted, despite the dormant Commerce Clause, to prefer "its own residents". *South-Central Timber*, 81 L. Ed. 2d at 83. It may "structure relations exclusively with its own citizens," thereby "solving local problems and distributing government largesse." *Reeves, Inc.*, 447 U.S. at 441. State revenues may be spent in such market transactions to favor or benefit "those who fund the state treasury and whom the State was created to serve."

> *Such policies ... reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.*

Id. at 442. (emphasis added).

Wisconsin, however, does not even try to claim that the statutes are intended to economically benefit its citizens (App. Brief, p. 24). Rather, it would have the Court establish the "Market Participation Doctrine" as a "carte blanche to impose *any* conditions that the State has the economic power to dictate." *South-Central Timber,* 81 L. Ed. 2d at 83 (emphasis added). It should be recognized that outside the context of the dormant Commerce Clause's consideration of state protectionism, the exception's foundation in the state's legitimate interest in favoring its own citizens in its dealings, is utterly lost. Consequently, the inherent limitations upon the exception are also lost.

Once applied outside the dormant Commerce Clause, the state may seek to achieve objectives that have nothing to do with favoring those who fund its treasury. Accepted by the Court as a *shield* protective of a state's paternalistic attitudes toward its own taxpayers, it would become a *sword* with which the state may cut a path toward any goal. With it, the state may pursue its own ends in areas which are governed by federal law and which are otherwise foreclosed to it. As Wisconsin's proffered new exception to the Supremacy Clause, the market participation doctrine would permit states to do indirectly—through the exercise of their considerable spending power[13]—that which they are not permitted to do directly. *Cf. Elrod v. Burns,* 427 U.S. 347, 361 (1976) (plurality opinion).

If permitted to run its course, the logical terminus of Wisconsin's argument is that the state, in the exercise of its contract power, is, as Wisconsin itself suggests, "unrestricted." Because "state sovereignty is implicated", the state is free to "fix the terms upon which it will make needed purchases." With sovereign contract power as its premise, unfettered from the

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[13] In 1984, state and local governments spent $191.3 billion on goods and services in the private sector. U.S. Commerce Department, Bureau of Economic Analysis, Vol. 65, *Survey of Current Business,* No. 4 p. 13 (April, 1985).

same constraints of the Supremacy Clause applicable to other forms of state action, local government is free to seek any goal and influence conduct toward any model which conforms to that state's "moral and social policy choices" (App. Brief at 30). Indeed, Wisconsin tells us a sovereign must have the "prerogative" to participate in the market in an *inefficient* manner to pursue its constituencies' choices. *Id.* (emphasis added).

But if that were true, then it would have the sovereign right to pursue moral and social policies hostile to, as well as consistent with, federal policy. *Cf. McCulloch v. Maryland,* 4 Wheat. at 428, 432-33. In short, if Wisconsin is free to debar labor law violators, then Louisiana is free to refuse to purchase from businesses whose employees are represented by unions which have committed violations of law or whose employees are unionized at all. Certainly, Louisiana is entitled to its own moral and social policy choices. If Wisconsin may debar for three violations, then Maryland is free to use its sword to smite those who have committed a single violation of the Act or an isolated labor contract breach. *Cf. Allis-Chalmers v. Lueck,* ____ U.S. ____ 85 L. Ed. 2d 206 (1985).

State spending power is not unrestricted. It is subject to the same limitations of the Constitution, *including the Supremacy Clause,* as any other form of state action. *Cf. McCulloch v. Maryland,* 4 Wheat. at 432-433.

While it is true that in *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 127 (1940), the Court stated, in *dicta,* that government contract power is "unrestricted", both prior and subsequent cases have held otherwise. In *Perry v. United States,* 294 U.S. 330, 348 (1935), the Court stated that the state's power to make contracts is necessarily subject to the dominant power of Congress. Likewise, in *Rosado v. Wyman,* 397 U.S. 397, 420 (1970), and in *King v. Smith,* 392 U.S. 309, 333-34 (1968), the Court clearly implied that a state may not spend its funds in a manner which violates any provision of the Constitution.

In *Lefkowitz v. Turley,* 414 U.S. 70 (1973), the Court held that states could not debar contractors because they had exercised their constitutional rights.[14] *See also, Sanitation Men v. Sanitation Commissioner,* 392 U.S. 280 (1968) and *Gardner v. Broderick,* 392 U.S. 273 (1968).

Elrod v. Burns, 427 U.S. at 357, further limited the state proprietary power. In *Elrod,* the plaintiff was discharged because he refused to make political contributions. Elrod contended that because public employment is a "benefit" and not a right, the benefit may be denied for any reason. The Court squarely rejected this argument:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely . . . one such impermissible reason: *The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly* . . . This Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a privilege. 427 U.S. at 360-61 (emphasis added).

In *Fullilove v. Klutznick,* 448 U.S. 448 (1980) (plurality opinion), the Court was faced with the question of whether Congress could exercise its proprietary power to create minority set-asides in the awarding of government contracts. *Perkins v. Lukens Steel Corp.* was not even mentioned. Rather, the Court recognized that Congress' own spending power is limited by the equal protection component of the Fifth Amendment's Due Process Clause. 448 U.S. at 480. As Justice Stewart, dissenting, noted at 448 U.S. 526-27:

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[14] Amici, National Governors' Association, *et al,* (Brief p.6 n.2) cite the New York statute declared unconstitutional in *Lefkowitz* as support for Wisconsin's claim that its statutes are constitutional.

> [I]n the exercise of its powers, Congress must obey the Constitution, *just as the legislatures of all the States must obey the Constitution in the exercise of their powers. (emphasis added).*

A state's spending power, like its other powers, must be exercised in a manner consistent with the Constitution and, under the Supremacy Clause, the laws of the United States. The preemption doctrine and its balancing tests have been developed and refined by this Court to protect federal law and policy from state interference while respecting legitimate state interests where such respect will not frustrate the dominant federal purpose. It insures consistency. It is fully applicable to any state action "regardless of the mode adopted". *Garmon,* 359 U.S. at 244.

The market participant doctrine, first ennunciated in *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 entails no contravention of these constitutional limitations on state spending power. *Alexandria Scrap,* for example, concerned the question of whether a state, when not attempting to regulate conduct, could spend its tax dollars as it saw fit to remove abandoned automobiles from its road ways. The statute in question paid a bounty for hulks. However, a hulk turned over to a licensed scrap processor located in Maryland did not require the same documentation to receive the bounty as did a hulk turned over to a licensed scrap processor whose plant was not in Maryland.

The plaintiff challenged the statutes on Commerce Clause and equal protection grounds. The plaintiff claimed, under the Commerce Clause, that the law burdened interstate commerce in that hulk suppliers would turn over the hulks to plants located in Maryland rather than to plants located outside of Maryland. The Court conducted the traditional preemption analysis. It determined that the federal purposes underlying the Commerce Clause's prohibition against state interference with interstate commerce, i.e., prevention of discriminatory taxes

and tariffs, were not implicated by a state's decision to do business with its own citizens when acting in the market place.

The Court concluded that while the right to engage in interstate commerce is not a gift of the state and, therefore, the state generally may not restrain it or regulate it, the Commerce Clause, in the absence of congressional action, does not prevent the state from entering the market and restricting its own trade to its own citizens or businesses within the state. *Id.* at 806-10. *Accord, Reeves, Inc. v. Stake,* 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204 (1983).

Thus, the market participation doctrine proceeds from the view that *"participation" in* the market is fundamentally different from *"regulation" of* the market. *A fortiori,* using a market and one's buying power therein, to regulate conduct outside that market and, indeed, having nothing whatsoever to do with that market, is something different altogether. *South-Central Timber,* 81 L. Ed. 2d at 83. In those dormant Commerce Clause cases in which it has been accepted, the states were not attempting by such local favoritism to control or reform private conduct having nothing to do with the market transaction in which the state was engaged. The end goal was *local favoritism;* the states had no other agenda or objective. Here, however, Wisconsin asserts that its goal is *not* local favoritism (App. Brief, p. 24). Rather it *does* seek to control, reform or influence private conduct outside of the transaction and the market in which it occurs. Consequently, the asserted distinction between mere "participation" and "regulation" breaks down.

When the spending power has been used to control and fashion conduct, it is a very potent and effective form of regulation.[15] It is a form of governance. Even under the

[15] The federal government has used its contract power extensively to regulate a variety of employment relations-related matters.

(Footnote continued on following page)

dormant Commerce Clause, this Court has recognized, albeit in another vein, that the state may not use its contracts to effectively regulate in a manner at odds with the Constitution.

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

South-Central Timber, 81 L. Ed. 2d at 83.

In the final analysis, "participation" which is designed and intended to regulate conduct is the consequential equivalent of direct regulation. Private conduct *is* governed by action of the sovereign. And when the focus of inquiry shifts to the Supremacy Clause, categorization of a state's effort to govern conduct as a "regulation" or mere "participation" is a particularly unhelpful exercise. In those cases where Congress has chosen to establish an integrated federal regulatory scheme, it is not to be interfered with "regardless of the mode adopted." *Garmon,* 359 U.S. at 244. "It is the substance of the transaction rather than the label attached to it," that should govern, *South-Central Timber,* 81 L. Ed. 2d at 84 n. 11, for the Constitution is concerned with essence, "not mere form." *Holmes v. Jennison,* 14 Pet. 540, 573 (1840).

In defense of its market participant theory, Wisconsin argues that it should be free to discriminate against contractors on any basis it chooses just like any private trader.

While the private trader concept has been utilized, principally by way of analogy, to justify the market participant exception to the reach of the dormant Commerce Clause, *Reeves, Inc,* 447 U.S. at 438-39, it is without validity in the case

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(Footnote continued from preceding page)

See, e.g., Davis-Bacon Act (40 U.S.C. § 276a *et seq.*), Walsh-Healy Act (41 U.S.C. § 35 *et seq.*), Rehabilitation Act of 1973 (29 U.S.C. § 793), and Executive Order 11246.

at bar. Wisconsin is not acting at all like a private trading partner in its own legitimate economic self-interests or those of its citizens. *Cf. Reeves, Inc.* 447 U.S. at 450 (Powell, J., dissenting). Here, as has been noted, Wisconsin pursues a regulatory agenda unrelated to the marketplace in whose freedoms Wisconsin seeks to cloak itself.

Outside the narrow scope of state-as-market participant's legitimate favoritism of its constituency, the state simply is not a private enterprise. A state, unlike a private enterprise, is not just one "player" on the stage of "shifting economic arrangements" of the private sector economy. *See Kovacs v. Cooper,* 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). Rather, it is a coordinate element in the system established by the Constitution for governance of the federal union. *National League of Cities v. Usery,* 426 U.S. 833, 849 (1976). *Accord, Garcia v. San Antonio Metropolitan Transit Authority,* ____ U.S. ____, 83 L. Ed. 2d 1016, 1031 (1985).

> The fact that local government may enter the domain of private enterprise . . . does not put it in the class of private business. . . . [L]ocal government exists to provide for the welfare of its people, not for a limited group of stockholders.

New York v. United States 326 U.S. 572, 593 (1946) (Douglas, J., dissenting).

Thus, even in the simple exercise of its proprietary functions, it must act for the benefit of its citizens as part of our federal system of government. And unlike a private trader, it must carry out these functions in a manner consistent with the Constitution. Consequently, a state, unlike General Motors, constitutionally may not condition award of its contracts upon the waiver of constitutional rights, *Lefkowitz v. Turley,* 414 U.S. at 70; unlike General Motors, may not decline to do business with Republicans or Democrats, *cf. Elrod v. Burns,* 427 U.S. at 357; *United Public Workers v. Mitchell,* 330 U.S. 75, 100 (1947); and unlike General Motors, may not condition employ-

ment upon the taking of a loyalty oath, *Wieman v. Updegraff*, 344 U.S. 183 (1952).

Nor may the state, unlike General Motors, act contrary to any other provision of the Constitution, including the Supremacy Clause. Unlike General Motors, the people of the various states "ordain[ed] and establish[ed]" the Constitution of the United States and the states must look to that Constitution for definition of their proper role in our federal system, vis-a-vis each other and the federal government.

Wisconsin claims, citing *Reeves v. Stakes, Inc.*, 447 U.S. at 439, that because market participant decisions are "politically charged," whether it may debar labor law violators is "better suited for Congress than this Court" (App. Brief p. 27).

Gould could not agree more. Congress has made the "politically charged" decision that debarment and other penal sanctions are inconsistent with the remedial purposes of the NLRA. It is not for the states to act contrariwise. *Cf. Bus Employees v. Wisconsin*, 340 U.S. at 394-95.

Amicus, AFL-CIO's argument is somewhat more subtle, but no more persuasive upon analysis. It does not claim, as does Wisconsin, that the state may pursue any goal as a market participant free from Supremacy Clause restraint. Amicus does urge, however, that Wisconsin's participation differs from regulation in three respects which, it contends, are germane to preemption analysis.

But, they are irrelevant or, at least, do not justify a different result.

Amicus argues that while nonregulation cannot fairly be said to constitute support of an unfair labor practice, contracting with the law violator does constitute support of illegal activity (AFL-CIO Brief at 14). By dealing with the violator, it may "enable him to profit from his misdeeds." (AFL-CIO Brief at 24). A position of neutrality, asserts AFL-CIO, does not exist.

Of course, a position of neutrality *does* exist. If the state wishes to remain neutral in regard to labor-management relations disputes, it need only divorce itself from such concerns when making its purchasing decisions.

Moreover, there is a basic fallacy inherent in this contention, as the instant case demonstrates. By the time of the debarment, there was no evidence that Gould was engaged in any unfair labor practices anywhere, in any division. Each had been remedied in conformance with the Board's order or as modified by the courts. There were simply no unfair labor practices for the state to be "associated with." Given the scope and structure of the Wisconsin statute, this would be true in virtually every debarment case.

Even if that were not the case, however, the state's neutrality is not the issue. Assuming *arguendo* that it is inconsistent for Congress to have outlawed certain practices but yet not debar those who commit them, Congress is entitled to enact an arguably anomalous legislative scheme consistent with its own judgments. It is entitled by the Constitution to pursue national policies in an area committed to its governance free from interference by states which may reach a different judgment.

The second respect merely restates the obvious that the exercise of state contract power does not bind private parties who may *theoretically* choose not to deal with the state. Be that as it may, the contract power is a potent means of regulation. In fact, as the AFL-CIO itself observes, contract conditions are often adopted for the "very purpose" of affecting behavior and "may have a more powerful effect on the conduct of private parties than even a criminal law." (AFL-CIO Brief at 9). In other words, the intrusive effect of state spending restrictions has the potential to exceed so-called direct forms of regulation.

Third, Amicus observes that the statutes create no state judicial or administrative system for state policy in the labor

context. But this fact, as the court of appeals noted, underscores the penal nature of the statute which has been found inimical to national policy. Moreover, it ignores the *de facto* administrative power which such state enactments give to the NLRB's General Counsel.

While such factors may serve in the AFL-CIO's thinking as a basis for a "clear intuitive difference in degree" between market regulation and participation (AFL-CIO Brief at 9), these observations simply beg the proper questions: Does state debarment of federal labor law violators interfere with the *purpose* of Congress behind its statutory scheme and, if so, to what degree? Or does the state have such a deeply-rooted local concern in the conduct to be governed that it cannot be said that the Congress *intended* to deprive them of the power to act?

The Court has recently noted, the purpose of Congress is the "ultimate touchstone" of preemption. *Metropolitan Life Insurance,* 85 L.Ed. 2d at 745. Yet neither Wisconsin, nor its amici, have utilized a single paragraph of their scholarly briefs to consider Congress' purpose in eschewing penal sanctions and providing ready access to the federal appellate judiciary, let alone explain how Wisconsin's statutes do not interfere with that purpose.

They do not because they cannot.

Rather, they propound esoteric theories in an effort to have the Court create exceptions to *Garmon* or proclaim that *Garmon* is not adequate. And even in these efforts, they cannot agree.

The inquiries dictated by *Garmon,* however, are broad indeed, broad enough to consider both the federal interest and the state interest, if any, in all their dimensions and to give each its proper weight. *Garmon* and its progeny recognize that states often have a legitimate local interest in aspects of conduct regulated by the NLRA. These cases demonstrate that the Supremacy Clause is flexible enough to accommodate such local interests. But the Court's decisions also affirm the primacy

of federal law in no uncertain terms. The state and federal governments are not equals whose respective interests in every field must both be served. *McCulloch v. Maryland,* 4 Wheat. at 435-36. Where state law interferes with the federal scheme it must fall "regardless of the mode adopted." *Garmon,* 359 U.S. at 244.

Contrary to Appellants' and *amici's* contentions, *Garmon* is particularly instructive in this case, for its facts raised similar considerations and issues. There, the question was whether the Supremacy Clause prohibited California from merely providing the additional remedy of damages for picketing which was assumed to be an unfair labor practice for the sake of the majority's analysis. Damages (like debarment) for engaging in prohibited conduct are not available under the Act. Thus, the question arose whether it was permissible for the state to provide compensation for unlawful conduct under its civil damage laws which the Board could only restrain. This Court forcefully answered the question.

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. *Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.* Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. . . . In fact, since remedies form an ingredient of any scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

Id. at 246-47 (emphasis added).

The reasoning which informed the *Garmon* Court can be transferred virtually wholesale to this case. Debarment is also "a potent method of governing conduct and controlling policy."

And, in Wisconsin's case, it was admittedly "designed to be." Likewise, since debarment has been withheld from the Board by Congress, to permit Wisconsin to invoke such a sanction "only accentuates the danger of conflict."

Whether the Court chooses to recognize some relevant distinction between participation and regulation for Supremacy Clause purposes, the potential for interference with the congressional purpose behind its federal labor policy must remain the touchstone of the preemption doctrine. Here, that interference is pernicious and pervasive; the state's legitimate interest nonexistent. Accordingly, preemption is appropriate.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

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